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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 2

NEW WORLD LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES.

MOTION TO EXTEND TIME ALLOWED FOR FILING PETITION FOR REHEARING ON PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS; AND, IN THE ALTERNATIVE, PETITION FOR A REHEARING ON PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable the Chief Justices and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner in the above-entitled cause and says that on November 22, 1939 its petition for a writ of certiorari to the Court of Claims was denied by this Honorable Court; that on December 11, 1939, the petitioner filed a motion to extend the time allowed for filing a peti-

tion for a rehearing on petitioner's petition for a writ of certiorari, and in the alternative a petition for a rehearing on petitioner's petition for a writ of certiorari herein; that on December 18, 1939, this Honorable Court entered an order granting petitioner's said motion and extending the time until March 15, 1940, within which to file a petition for a rehearing herein; that the time for filing a petition for a rehearing herein will expire on March 15, 1940, according to said order of this Court.

That petitioner's said petition for a writ of certiorari raised two questions, namely:

> 1. Whether a portion of total salaries paid by petitioner to its officers and cashiers for part-time services rendered in the investment branch of its business and charged as investment expenses may be deducted by petitioner as "investment expenses" under Sec. 203 (a) (5) of the Revenue Acts of 1928 and 1932.
>
> 2. Whether petitioner's Disability Reserve, Active Lives and its Disability Reserve, Disabled Lives are "reserve funds" within the meaning of Sec. 203 (a) (2) of the Revenue Acts of 1928 and 1932. (Pp. 8, 9 of Petition for Writ of Certiorari.)

That *Com.* v. *Volunteer State Life Ins. Co.*, No. 7939 is now pending in the Circuit Court of Appeals for the Sixth Circuit on petition for review by the Commissioner from the decision of the Board of Tax Appeals, which was directly contrary to the decision of the Court of Claims in the instant case on the question of investment expenses; that said cause was argued approximately five months ago on October 10, 1939, and that a decision thereon should be rendered by the Circuit Court of Appeals very soon; that in the event that the Circuit Court of Appeals for the Sixth Circuit should affirm the Board of Tax Appeals, there will be a direct conflict of a decision of a Circuit Court of Appeals with the decision of the Court of Claims in the instant case.

That the same question also is pending in the Federal District Court of Massachusetts in *Boston Mutual Life Ins.*

Co. v. *White,* Nos. 5332, 5333, 5334; but petitioner has been informed by the Department of Justice that these cases are now on the reserve calendar of said court pending the decision of the Circuit Court of Appeals for the Sixth Circuit in *Com.* v. *Volunteer State Life Ins. Co., supra.*

That *Com.* v. *Monarch Life Ins. Co.,* Nos. 3470, 3475, *Com.* v. *Pan-American Life Ins. Co.,* No. 9175, and *Com.* v. *Oregon Mutual Life Ins. Co.,* No. 9318, are now pending in the Circuit Courts of Appeals for the First, Fifth, and Ninth Circuits, respectively, on petitions for review by the Commissioner of decisions of the Board of Tax Appeals, which were all contrary to the decision of the Court of Claims in the instant case, on the question of reserve funds; that petitioner has been informed by the Department of Justice as follows:

That *Com.* v. *Pan-American Life Ins. Co., supra,* has been set down for argument in the Circuit Court of Appeals for the Fifth Circuit on March 11, 1940; that *Com.* v. *Monarch Life Ins. Co., supra,* was set down for argument in the Circuit Court of Appeals for the First Circuit during the January Term of that Court, but that due to illness of Counsel for respondent the same was passed and reset for argument during the April Term; that the Government's brief has been filed in *Com.* v. *Oregon Mutual Life Ins. Co., supra,* and that the respondent's brief will be filed shortly, when said case is expected to be set down for argument in the Circuit Court of Appeals for the Ninth Circuit during the spring of 1940.

That decisions by the respective Circuit Courts of Appeals in all probability will be handed down in all of said causes before the expiration of the present term of this Honorable Court; and that in the event the Board of Tax Appeals should be affirmed in either of said causes, there will be a direct conflict in a Circuit Court of Appeals with the decision of the Court of Claims in the instant case; that the petitioner is informed and believes that petitions for writs of certiorari will be filed in this Honorable Court in

said causes irrespective of whether the issues are decided in favor of the Government or the taxpayers.

That both of the questions involved in the petition for a writ of certiorari herein are different from the ordinary questions arising in tax cases, in that they are recurring ones which affect the rendition of petitioner's income tax returns for each taxable year; that if this Honorable Court should grant certiorari in one of the foregoing causes and decide either of the questions contrary to the decision of the Court of Claims in the instant case, petitioner would be precluded from benefiting from the decision of this Court with respect to the taxable years involved in the instant case, and might be precluded from benefiting with respect to subsequent years under the principle of *res judicata;* that, in fact, petitioner now has pending other cases in which the identical questions are involved; viz., *New World Life Ins. Co.* v. *U. S.*, No. 44599 in the Court of Claims, and *New World Life Ins. Co.* v. *Com.*, No. 98355 in the Board of Tax Appeals; that for the above reasons, in petitioner's humble judgment, it would be just and equitable to extend the time until the expiration of the present term of this Court within which the petitioner may file a petition for a rehearing on its petition for a writ of certiorari herein.

That petitioner is informed and believes that this Court granted motions extending the time within which to file petitions for rehearing on petitions for writs of certiorari under somewhat similar circumstances in *Farmers Loan and Trust Co.* v. *Bowers*, Nos. 614, 615, October Term, 1938, granted April 2, 1939 until the expiration of the October, 1938 Term, and in *Stone* v. *White*, No. 202, October 1935 Term, granted November 11, 1935 until the end of the October 1935 Term; that further extensions of time were granted in said last-mentioned case on June 1, 1936 until November 2, 1936, and again on October 29, 1936 until December 8, 1936; and that subsequently, this Court in *Stone* v. *White* granted leave to file a petition for a rehearing on the petition for a writ of certiorari out of time; and that this Court later granted certiorari therein.

WHEREFORE, petitioner prays that the time for filing a petition for a rehearing on its petition for a writ of certiorari herein may be extended until the expiration of the present term of this Court.

In the alternative, and in the event that this Honorable Court in its discretion should not grant the further extension of time prayed for in the foregoing motion, the petitioner presents this, its

PETITION FOR A REHEARING OF ITS PETITION FOR A WRIT OF CERTIORARI

in the above-entitled cause, and in support thereof, in addition to the facts alleged in its original petition for a writ of certiorari, respectfully shows:

Relative to Investment Expenses

The Court of Claims originally decided the question of investment expenses in favor of the taxpayer, in *Sun Life Ins. Co.* v. *U. S.* (1935), 81 Ct. Cls. 892; however, that Court decided the identical question in favor of the Government in the instant case.

Whether a life insurance company may take a deduction for investment expenses such as petitioner claims herein is of great importance to life insurance companies and to the Government, inasmuch as it is a recurring question with life insurance companies[1] each year at the time they render their income tax returns, due to the fact that Section 203(a)(5) of the Revenue Acts of 1928 and 1932 have been reenacted in all subsequent revenue acts.

The importance of the question is further evidenced by the fact that the Government filed a petition for review in *Volunteer State Life Ins. Co.* v. *Com.* (1937), 35 B. T. A. 491, in the Circuit Court of Appeals for the Sixth Circuit,

[1] Best's Life Ins. Reports for year ending 1938 shows approximately 290 life insurance companies transacting business in the U. S.

which was argued in that court on October 10, 1939, but not yet decided.

Relative to Reserve Funds

In the petition for a writ of certiorari (pp. 10, 18) petitioner assigned as one of the reasons for granting the writ, the fact that the Court of Claims absolutely disregarded the decision of this Court in *Helvering* v. *R. J. Reynolds Tobacco Company*, 306 U. S. 110, in which this Court expressly held that the Secretary of the Treasury had no authority to amend Regulations that had been in force for a number of years and to apply the amended Regulations retroactively to years prior to the effective date of the amendment. We quote briefly from the opinion by Mr. Justice Roberts as follows:

> "We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force.
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> "Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

In *Helvering* v. *Wilshire Oil Company, Inc.*, 308 U. S. 90, the *Reynolds Tobacco* case, if not expressly, was at least impliedly approved by this Court. We quote in part from the opinion of Mr. Justice Douglas as follows:

> "But in any event, the validity of the regulations in question seems clear. The oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change (*United States* v. *Dakota-Montana Oil Co., supra*) covers the situation where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice prior

to reenactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed *prospectively* through exercise of appropriate rule-making powers.

* * * * * * * *

"The only remaining question is whether Treasury Regulations 74, Art. 221 (i) were within the power of the Commissioner to promulgate. That they were seems clear beyond question. *We are not dealing here, as was this Court in Helvering* v. *R. J. Reynolds Tobacco Co., supra, with regulations applied retroactively. These are applied prospectively only.*" (Italics ours.)

Petitioner respectfully submits that the law is now settled by these two decisions of this Court handed down during 1939 that the Commissioner may amend his regulations and apply them prospectively to *subsequent years,* but that he may not amend them and apply them retroactively to *prior years,* as the Court of Claims did in the instant case.

Beginning on page 10 of the petition for a writ of certiorari, and beginning on page 18 of the brief in support thereof, the petitioner set forth the undisputed fact that the Commissioner's regulations from 1921 until 1935 expressly authorized a deduction of the statutory percentage of the mean of disability reserves, active lives, and disabled lives, such as petitioner claims herein; that the life insurance income tax return, Form 1120L, prepared by the Commissioner, contained lines for such deductions; that it was not until December 18, 1935, practically three years after the end of the last taxable year involved in this proceeding, that the Commissioner, by T. D. 4615, amended his regulations by eliminating therefrom the provision authorizing the deduction; and that following amendment thereof,

the Commissioner applied them retroactively and disallowed the same character of deductions for petitioner's taxable years 1929 to 1932, inclusive, which he actually had allowed for all prior years beginning in 1921 in accordance with existing regulations.

May an inferior court decide a case in *direct conflict* with the decision of this Court, which the Court of Claims did in this case, with the result that its decision shall be final and conclusive upon the parties, without resort to this Court for relief? Unless this Court grants petitioner's petition for a writ of certiorari herein the answer will be in the affirmative.

The importance of this question is further evidenced by the fact that the Commissioner in each case decided against him by the Board of Tax Appeals has filed petitions for review; viz., *Com.* v. *Monarch Life Ins. Co.*, *Com.* v. *Oregon Mutual Life Ins. Co.*, and *Com.* v. *Pan-American Life Ins. Co., supra.* Furthermore, the question is almost certain to be presented to this Court during the next few months, as petitioner is informed and believes that decisions of the respective Circuit Courts of Appeals in all probability will be handed down during the present term of this Court, and that petitions for writs of certiorari will be filed in said causes irrespective of how they are decided by the Circuit Courts of Appeals.

Prayer.

WHEREFORE, petitioner prays that its petition for a rehearing on its petition for a writ of certiorari may be granted; and that upon reconsideration, this Court may vacate its order entered herein on November 22, 1939 and enter a new order granting the petition for a writ of certiorari in this cause.

Respectfully submitted,

WALTER E. BARTON,
Investment Building,
Washington, D. C.,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for petitioner herein, hereby certifies that the foregoing motion to extend time allowed for filing petition for rehearing on petitioner's petition for a writ of certiorari, and, in the alternative petition for a rehearing on petitioner's petition for a writ of certiorari are presented in good faith and not for delay.

WALTER E. BARTON,
Counsel for Petitioner.

Dated, Washington, D. C.
March 4, 1940.